IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 315 OF 2007
WITH
CIVIL APPLICATION NO. 1497 OF 2006

Shri Balshiram Baburao Morde ..Appellant

Vs.

Shri Tulshiram Baburao Morde
and anr. ..Respondents

Mr. P.S. Dani for appellant.
Ms. Manjiri Parasnis i/by Mr.G.S. Godbole and Mr. R.D. Barve for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : June 26, 2007.

P.C.:

1. Heard Mr. Dani the learned counsel for the appellant-defendant no.1. He has also shown the receipt signifying the deposit of costs amount with the Maharashtra State Legal Services Authority on 26/4/2007.

2. This second appeal arises from the preliminary decree passed by the learned Civil Judge, J.D. at

Ghodegaon on 6/4/2004 in RCS No. 3 of 1995 and confirmed by the Lower Appellate Court in Civil Appeal No. 313 of 2004. The Lower Appellate Court by its Judgment and Order dated 14/12/2005 decreed the RCS No. 3 of 1995 in its totality as against the trial court's order of decreeing the suit partly. The Lower Appellate Court has issued the mandatory injunction against defendant no.1 to remove the cattle shed and tin shed erected on the 10 feet wide strip of open land and by making encroachment on the part of the open space allotted to the share of the plaintiff.

3. The defendant no.1 was examined before the trial court. Undoubtedly, the plaintiff and the defendants are brothers and partition had taken place about 12 years prior to the filing of the suit or in the year 1973. It was not disputed that the suit land admeasuring 34 R in Gat No. 198 was the share of the plaintiff and on the Northern Side the plot admeasuring 4 R was the disputed land. The defendant no.1 in his evidence admitted that the cattle shed was constructed by the defendants and the plot of land on which the cattle shed was standing was part of the

plot which had gone to the share of the plaintiff. It has also come in the evidence that the cattle shed and tin shed were erected on 10 feet. wide strip of open land belonging to the plaintiff. On these admitted statements, the Lower Appellate Court held that the trial court was not right in confining the decree only to the tin shed leaving behind the cattle shed. The findings recorded by the Lower Appellate Court are based on the oral and documentary evidence adduced by the respective parties and thus is a fact finding exercise. This second appeal, therefore, does not raise any substantial question of law for the consideration of this court and it is also pertinent to note that the decree passed by the trial court was not challenged by the present appellant-defendant no.1.

4. Hence the appeal is dismissed in limine.

5. Civil Application No. 1497 of 2006 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)